Office-Supreme Court, U.S.
FILED
OCT 6 1964
JOHN F. DAVIS, CLERK

No. 495

In The

Supreme Court of the United States

October Term, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MOTION TO DISMISS AND BRIEF

GEORGE THOMPSON
Attorney General of Wisconsin

ROY G. TULANE
Assistant Attorney General of Wisconsin

ROBERT D. MARTINSON
Assistant Attorney General of Wisconsin

Attorneys for the State of Wisconsin

Post Office Address:

Room 114 East
State Capitol
Madison, Wisconsin

INDEX TO MOTION TO DISMISS

PAGE

MOTION TO DISMISS 1-2

S. Ct. Rule 16, paragraph 1 (b) 1

United States Constitution Article I, sec. 10 ..... 1, 2

INDEX TO BRIEF IN SUPPORT OF MOTION

SUBJECT INDEX

NATURE OF THE CASE 1

STATEMENT OF FACTS 2-4

JURISDICTION 4

QUESTIONS PRESENTED 5

ARGUMENT 6-13

I. DEFENDANT MUTTER, NOT A PARTY TO THE CONTRACT, DELIBERATELY VIOLATED THE LAW AS IT EXISTED ON THE DATE OF THIS VIOLATION AND HENCE HAS NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THAT LAW 6

II. THE STATUTE, CHAPTER 195 OF THE LAWS OF 1959, IS CONSTITUTIONAL UNDER THE FACTS IN THIS CASE 7-13

a. *There is neither allegation or proof, nor could there be any, that any innocent third party having valid contractual rights with the county has been injured* 7

PAGE

B. Absent such a fact status as is pointedly discussed in paragraph (a) the power of the state over its subordinate municipalities is paramount 7-12

c. Gomillion v. Lightfoot distinguished 13

CONCLUSION 14

CERTIFICATE OF SERVICE 15

CASES CITED

Dodge v. Board of Education (1937) 302 U. S. 74, 58 S. Ct. 98, 82 L. ed. 57 10

Gomillion v. Lightfoot (1960) 364 U. S. 339, 81 S. Ct. 125, 5 L. ed. (2d) 110 13

Graham v. Folsom (1906) 200 U. S. 248, 26 Sup. Ct. 245, 50 L. ed. 464 8

Hall v. State (1880) 103 U. S. 5, 26 L. ed. 302 9

Hooker v. Burr (1904) 194 U. S. 422, 24 S. Ct. 706, 48 L. ed. 1046 6

Hunter v. Pittsburg (1907) 207 U. S. 161, 28 Sup. Ct. 40, 52 L. ed. 151 ..... 10, 11

Mobile v. Watson (1886) 116 U. S. 289, 6 Sup. Ct. 398, 29 L. ed. 620 8

PAGE

Mt. Pleasant v. Beckwith (1879) 100 U. S. 514, 34 Sup. Ct. 317, 25 L. ed. 699 8

State of Indiana ex rel. Anderson v. Brand (1938) 303 U. S. 95, 58 S. Ct. 443, 82 L. ed. 685 ..... 9, 10

The Trustees of Dartmouth College v. Woodward (1818) 17 U. S. 518 9

Trenton v. New Jersey (1923) 262 U. S. 182, 43 S. Ct. 534, 67 L. ed. 937 ..... 10, 11, 12

Williams v. Mayor of Baltimore (1933) 289 U. S. 36, 53 Sup. Ct. 431, 77 L. ed. 1015 ..... 7, 12

Worcester v. Worcester Consolidated Street Railway Co. (1905) 196 U. S. 539, 25 Sup. Ct. 527, 49 L. ed. 591 12

CONSTITUTION

United States Constitution

Article I, sec. 10 ..... 4, 5, 6, 13

Fifteenth Amendment 13

OTHER AUTHORITIES

46 Op. Atty. Gen. of Wis., p. 16 (1957) 3

Sup. Ct. Rule 35, paragraph 1 1

STATUTES

PAGE

Wisconsin Statutes

Sec. 26.06 (2) 2, 4

28.12 3

77.10 (2) (a) 3

Ch. 28 2

7. 2

195, Laws of 1959 ..... 3, 4, 7

227 3

No.....

In The

Supreme Court of the United States

October Term, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MOTION TO DISMISS

Pursuant to paragraph 1 (b) of Rule 16 of rules of the Supreme Court of the United States, the State of Wisconsin, by its Attorney General, moves to dismiss the appeal upon the ground that the appeal does not present a substantial federal question in the following respects:

1. Appellant seeks to invoke the provisions in Article I, Section 10 of the United States Constitution forbidding state legislation impairing the obligations of contract. Appellant is not a party to the contract claimed to be impaired and had no legal, financial, beneficial or equitable interest therein.

2. Appellant never pleaded or proved facts to establish terms of the contract claimed to have been impaired by subsequent state legislation. Specifically he did not allege or prove that either himself or any other person, natural or corporate, had contractual rights with the county which would be impaired or adversely affected by the state legislation complained of. Hence the following rule is applicable.

3. Counties are only subordinate agencies of the state and the state, as far as Article I, Section 10 is concerned, has complete power to amend their controlling statutes or charter or to abolish the counties entirely. Further, that the power of a state by legislation to affect its working agreements or relations with the county on the facts shown in this record is fully established by authoritative decisions of this court.

GEORGE THOMPSON
Attorney General of Wisconsin

ROY G. TULANE
Assistant Attorney General of Wisconsin

ROBERT D. MARTINSON
Assistant Attorney General of Wisconsin

Attorneys for the State of Wisconsin

In The

Supreme Court of the United States

October Term, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF IN SUPPORT OF MOTION TO DISMISS

Pursuant to paragraph 1, of Rule 35 of the Rules of the Supreme Court of the United States, the State of Wisconsin files this its brief in support of its motion to dismiss the appeal herein.

NATURE OF THE CASE

This is an appeal by Anthony Mutter from a judgment of the Supreme Court of Wisconsin upholding his conviction on a charge of unlawfully removing state seizure tags from lumber cut on county forest property entered under the State Forest Crop Law. The decision of the Wisconsin Supreme Court has been reported in 23 Wis. 2d 407, 127

N. W. (2d) 15 (1964) which is appended to the jurisdictional statement of appellant as appendix A. This judgment of the Supreme Court of the State of Wisconsin affirmed a judgment of the Circuit Court for Vilas County, Wisconsin which had in turn affirmed a conviction of appellant in county court for Vilas County, Wisconsin, convicting the defendant of a charge defined in Section 26.06 (2) of the Wisconsin Statutes, of removing seizure notices of the State Conservation Commission of Wisconsin from decked pulpwood cut on lands entered as forest crop lands under Ch. 77 Wisconsin Statutes.

STATEMENT OF FACTS

Anthony Mutter, an employee of Vilas County, on December 24, 1961, acting on his own initiative and responsibility, removed eight seizure notices of the Conservation Commission from decked pulpwood which had been cut from lands owned by Vilas County.

On December 19, 1961, the said logs had been seized by the Conservation Commission as logs which had been unlawfully cut from lands entered under the Forest Crop Law, Ch. 77, Wis. Stats. and seizure notices placed thereon. At the time of the offense the logs were in the constructive custody of the Conservation Commission.

Since 1927 Wisconsin has had statutes now found in Chapters 77 Wis. Stats. and Chapter 28, Wis. Stats. which provided for the protection, preservation and development of its forest lands, both privately owned and in county ownership. The principle of these laws was that taxes were to be deferred on privately owned lands and counties were

to be compensated for the development of county forest lands upon condition of later reimbursement to the State when the lands were sold or the timber cut, for the State funds advanced in the case of counties and for deferred taxes in the case of privately owned lands.

Through successive amendments of the basic statutes a quirk apparently appeared in the statutes which was pointed out in 46 Opinions of the Attorney General of Wisconsin, page 16 (1957) under which it appeared that the county could withdraw its lands from the entry under the Forest Crop Law, allegedly not for sale and thereafter cut the timber from the land and sell it without reimbursing the State for its advancement.

Thereafter by the Bill which became Ch. 195, Laws of 1959, which amended Sec. 77.10 (2) (a) it was attempted to plug this loophole by providing that the general provisions for withdrawal and sale found in Section 28.12 of the Wisconsin Statutes, applied to all county withdrawals. It was this amendment to the statutes which Mutter apparently acting on assumed authority of Vilas County attempted to challenge by the device of purporting to withdraw lands from entry and to thereafter enter into timber sales contracts.

Wisconsin law provides an orderly method of reviewing the validity of the attempted withdrawals under Ch. 227, Wis. Stats. which is the Wisconsin Administrative Procedure Act.

Instead of attempting to review the validity of the purported withdrawal of lands under this statute, in October 1961 the Vilas County Forestry and Land Committee ad-

vertised timber sales on various lands, most of which had been entered under The Forest Crop Law in 1933 and including one parcel entered in 1938 and one in 1945.

After the timber had been cut, agents of the State Conservation Commission of Wisconsin placed seizure notices on the decked logs in order to protect their right to reimbursement for the funds advanced to the county.

Instead of proceeding through judicial means to determine the validity of the seizure, Anthony Mutter, apparently on his own initiative, went and removed the seizure notices from the decked logs. He was thereupon arrested and charged with violation of Section 26.06 (2) Wis. Stats. and was duly convicted in county court, affirmed in Circuit Court, and affirmed on appeal to the Wisconsin Supreme Court.

His defense, which is the basis of this appeal. was that the 1959 Statute of the State of Wisconsin, Ch. 195 of the Laws of 1959, was a violation of Article I, Section 10 of the Constitution of the United States and of no other provision. It i the validity of that contention which is now before the court.

JURISDICTION

Jurisdiction is opposed on the ground that no substantial federal question is involved.

QUESTIONS PRESENTED

I. Can Anthony Mutter, not a party to the contract, acting on December 24, 1961, claim that an amendment to the Statutes governing the county forest laws passed as of 1959 was a violation of Article I, Section 10 of the United States Constitution.

II. Under the controlling decisions of this court and the facts shown by the record herein, does not the State of Wisconsin have the right to alter or amend its own contract or working agreement with Vilas County when the effect of the amendment is solely to assure reimbursement to the State of funds which originally came from the state treasury.

ARGUMENT

I. Defendant Mutter, not a party to the contract, deliberately violated the law as it existed on the date of this violation and hence has no standing to challenge the constitutionality of that law.

On this point we respectfully suggest that the case is controlled by:

Hooker v. Burr (1904) 194 U. S. 422, 24 S. Ct. 706, 48 L. ed. 1046.

In Hooker, an independent purchaser at a foreclosure sale held after the date of the passage of the statute amending the foreclosure laws, attempted to claim that a previous amendment of the foreclosure laws was unconstitutional and that he should have the benefit of the law as it existed prior to the date of the amendment of the Statutes.

The court clearly and definitely held that the independent purchaser coming in after an amendment of the law had to accept the Statutes as they existed at the time of his purchase and he could not allege the unconstitutionality of a previous amendment on the ground that it violated the United States constitutional rule against the impairment of contracts under Article I, Section 10 of the United States Constitution.

In the instant case Mutter, as we have shown in our statement of facts, deliberately violated the State Statute passed more than two years before the date of his violation. Mutter must take the State Statutes as he finds them and cannot thereafter argue that the rights of the third party, in this case the county, protect him in his violation.

II. The Statute, Chapter 195 of the Laws of 1959, is constitutional under the facts in this case.

a. There is neither allegation or proof, nor could there be any that any innocent third party having valid contractual rights with the county has been injured.

The law is clearly established that any person challenging the constitutionality of a Statute has the burden of proving every fact necessary to establish that unconstitutionality. Out of the host of cases which could be cited to this proposition we will refer to only one.

Williams v. Mayor of Baltimore (1933) 289 U. S. 36, 42, 53 Sup. Ct. 431, 77 L. ed. 1015.

As we will show in our analysis of the cases cited in the respective briefs, if Vilas County had made a valid contract with some third party which depended upon the continued existence of the Statutes as they existed prior to 1959, then there might be a valid claim that the Statute of 1959 was unconstitutional. No such claim was made by any pleading, no proof was adduced that such a state of facts existed.

b. Absent such a fact status as is pointedly discussed in paragraph (a), the power of the state over its subordinate municipalities is paramount.

Contrary to appellant's completely unfounded assertion on page 7 of his brief that the appeal herein presents an issue which has never been decided by this court or by any other court in the land, we respectfully submit and urge that the law is clearly settled as far as any law ever

can be for those who are willing to read and analyze the cases.

The rule of law which we submit is settled may be succinctly stated as follows:

If a municipality has entered into a valid contract with a third person, a private party, the State cannot pass a valid Statute which will interfere with the rights established by that contract. Conversely, if there is no third party involved, the municipality has no vested rights whatsoever against the State and the State has paramount power to control its creature municipality.

In the first group of cases we will find primarily bond cases where the effect of the State Statute would be to in effect default on bonds issued by the municipality. These cases are:

Graham v. Folsom (1906) 200 U. S. 248, 26 Sup. Ct. 245, 50 L. ed. 464;

Mt. Pleasant v. Beckwith (1879) 100 U. S. 514, 34 Sup. Ct. 317, 25 L. ed. 699;

Mobile v. Watson (1886) 116 U. S. 289, 6 Sup. Ct. 398, 29 L. ed. 620.

In all three of these cases Statutes which would invalidate contracts and destroy the rights of private citizens holding obligations of the municipality affected were held invalid. Two cases which are often cited in this connection, which are clearly not in point, involve direct contracts between the State itself and a private citizen. Examples of this class are:

Hall v. State (1880) 103 U. S. 5, 26 L. ed. 302;

State of Indiana ex rel. Anderson v. Brand (1938) 303 U. S. 95, 58 S. Ct. 443, 82 L. ed. 685.

In the *Hall* case, which arose in Wisconsin, the legislature had passed an act to provide for a Geological, Mineralogical, and Agricultural Survey of the State. Under the authority of this Statute, Hall signed a contract executed by the Governor in the name of the State. All that this case held was that the State could not repudiate its contract of employment with Hall. It has nothing to do with the power of a State over its municipalities. Similarly, the *Indiana* case appears to be a case of a contract between the State itself and its teachers to provide for tenure. This too does not involve any power of the State over its municipalities.

The *Hall* case expresses the reason needed for this rule on page 11 as follows:

> "When a State descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly. *Davis v. Gray,* 16 Wall. 203."

A somewhat related case is the famous Dartmouth College case:

The Trustees of Dartmouth College v. Woodward 17 U. S. 518 (1818).

In this case the court held that a charter rendered by a sovereign to a private corporation was a contract which could not be affected by subsequent state legislation. Quaere, would this rule be effective today in those states

which by their constitutions have reserved the right to alter, amend or repeal charters granted by the State after the constitution is adopted?

A related case which is again not a case involving the power of the State over municipality is

Dodge v. Board of Education (1937) 302 U. S. 74, 58 S. Ct. 98, 82 L. ed. 57.

This case again was not a case involving the power of the State over the municipality. In this case, contrary to the result in the *Indiana* case, the court held that a provision for a teacher's annuity was not established by contract under the controlling statutes and hence the provision for the annuity was not protected by the contract laws of the United States Constitution. In this case the court stated at page 78:

> "On the other hand an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the Legislature."

On the other hand, where the facts show that the contractual rights of no private third parties are involved, the cases clearly establish that the State power over the municipality is complete.

The leading cases on this point are:

Trenton v. New Jersey (1923) 262 U. S. 182, 43 S. Ct. 534, 67 L. ed. 937;

Hunter v. Pittsburg (1907) 207 U. S. 161, 176, 28 Sup. Ct. 40, 52 L. ed. 151, 158.

Of these the most often quoted case is the case of *Hunter v. Pittsburg.*

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . . The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

The case of *Trenton v. New Jersey* contains, particularly at pages 262 U. S. 186 and 187, 67 L. ed. pp. 940, 941, an exhaustive analysis of the subject discussing many cases and quoted with approval from *Hunter v. Pittsburg* (207 U. S. p. 178) a portion of the quotation set forth immediately above.

The *Pittsburg* case involved a claim that the State did not have power to establish a coercive consolidation of the

cities of Pittsburg and Allegheny over the wishes of the Allegheny inhabitants. The *Trenton* case held that the State could take away from the city of Trenton a previously existing alleged right to take water for the uses of the city of Trenton from the Delaware River without charge, and imposing a charge after the passage of the Statute. In both cases the Statutes were upheld in trenchant opinions.

Another case involving the exercise of State sovereign power over its municipalities is the case of *Williams v. Mayors* (1933) 289 U. S. 36, 53 Sup. Ct. 431, 77 L. ed. 1015.

In this case the court upheld over the violent opposition of the cities of Baltimore and Annapolis the power of the Maryland legislature to exempt a certain insolvent railroad from local taxation over the objection of the two municipalities. Another related case is *Worcester v. Worcester Consolidated Street Railway Co.* (1905) 196 U. S. 539, 25 Sup. Ct. 527, 49 L. ed. 591.

In this case the court upheld over the objections of the city of Worcester the right of the State to change the method in which the Street Railway would pay for certain paving. This case is of interest because there was a contract between the city of Worcester and the Street Railway, but the court held that the third party, Street Railway, could consent to an abrogation of the contract and accept the State Statute. The court stated that the provisions of the contract clause were intended for the protection of the third parties and not for the protection of the municipalities.

c. *Gomillion v. Lightfoot distinguished*

The case of *Gomillion v. Lightfoot* (1960) 364 U. S. 339, 81 Sup. Ct. 125, 5 L. ed. (2d) 110, has no bearing on this case whatsoever. Here the constitutional provision involved was the 15th Amendment and not Article I, Section 10. In its decision the court stated:

> "• • • Thus a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, *but rather that the State's authority is unrestrained by particular prohibitions of the Constitution considered in those cases.*" (Emphasis added)

Here is a clear ruling by the court itself in the *Gomillion* case that the ruling in the *Gomillion* case does not affect cases arising under Article I, Section 10 of the Constitution.

CONCLUSION

We respectfully submit that the rule of law established by the cases in the various classes is clear, that this appeal not only does not present a question which is substantial but presents no question at all,

We respectfully submit that jurisdiction should not be noted.

Respectfully submitted,

GEORGE THOMPSON
Attorney General of Wisconsin

ROY G. TULANE
Assistant Attorney General of Wisconsin

ROBERT D. MARTINSON
Assistant Attorney General of Wisconsin

Attorneys for the State of Wisconsin

Dated this 1st day of October, 1964

CERTIFICATE OF SERVICE

I, Roy G. Tulane, a member of the Bar of this Court, hereby certify that I have this day served the foregoing Motion to Dismiss and Brief in Support thereof upon the Counsel of Record for the Appellant herein, by mailing a copy thereof with first class postage prepaid, addressed as follows:

Edward B. Cleveland
Attorney at Law
2100 Marine Plaza
Milwaukee, Wisconsin 53202

ROY G. TULANE
Assistant Attorney General
of Wisconsin

Counsel of Record for Appellee

Dated this 5th day of October, 1964.